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No. 01-321

In The
Supreme Court of the United States

THOMAS E. TILLEY,

Petitioner,

v.

TOWN OF ABERDEEN,
NORTH CAROLINA, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS TOWN OF ABERDEEN, J. ARTHUR PARKER, TONY ROBERTSON, GILES HOPKINS, DON WALKER, STEVE BIGGS and BILL MARTS

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PARTIES TO THE PROCEEDING

Defendants, the Brough Law Firm and William C. Morgan, Jr., were dismissed from this lawsuit pursuant to a stipulation of dismissal, signed by all parties, which was filed on July 12, 1999.

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STATEMENT OF THE CASE

This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of defendants, Town of Aberdeen, J. Arthur Parker, Tony Robertson, Giles Hopkins, Don Walker, Steve Biggs and Bill Marts (collectively the "Aberdeen Defendants").

The following are additional facts or clarifications of statements in the Petition for a Writ of Certiorari. The complaint filed by Petitioner Tilley and Investment Trust[1] alleges only that the Town of Aberdeen, "through its agent", refused at various times to grant permission to bring additional mobile homes into the Carolina Mobile Home Park. The complaint does not contain any allegation that plaintiffs ever received any type of formal, final decision from the Town of Aberdeen, or that plaintiffs sought a variance from the Town. See Complaint, Appendix A.

Chapter 155 of the Aberdeen Code of Ordinances (hereinafter the "Zoning Code"), specifically states at § 155.253:

> It is the intention of this chapter that all questions arising in connection with the enforcement of this chapter shall be presented first to the administrative officer and that such questions shall be presented to the Board of Zoning Adjustment only on appeal from the administrative officer, and that from the decision of the Board of Adjustment, recourse shall be had to courts as provided by law.

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1 Until the filing of the Petition with this Court, Investment Trust, represented by counsel, had been a named plaintiff and had joined with Petitioner Tilley in all pleadings and briefs filed by the plaintiffs in this case. Additionally, consistent with Petitioner's representation to the court at oral argument, the district court indicated in its opinion dismissing Plaintiffs' claims that Investment Trust owned the mobile home park in question. See Appendix C, p.C-2 of Petition.

The Zoning Code further states: "[a]ppeals from the decision of the administrative officer shall be made to the Board of Adjustment." (Id. at §155.250).

Moreover, N.C. Gen. Stat. § 160A-388 states that, "[t]he Board of Adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of [a zoning ordinance]."

Petitioner's complaints arise from the interpretation and implementation of the Zoning Code. Petitioner alleged that at various times from 1989 to 1995 he had been refused permission to park mobile homes at a total of 25 lots in the mobile home park unless the trailers hooked up to the Town sewer system. He also claimed that in 1996 he was informed he could not use the 25 vacant lots to park trailers because it would violate the current zoning. However, Petitioner did not challenge the alleged decisions by the appropriate procedures, or otherwise seek relief, at that time nor has he ever. Accordingly, Petitioner has, at most, a decision from an administrative official that he cannot continue the use.

Petitioner also claimed he must be allowed to continue to use on-site septic systems. However, this is also an issue governed by the Zoning Code. Section 155.156 requires that "manufactured home parks be connected to municipal water and sewer systems or other systems approved by the County Health Department or the State Department of Natural Resources and Community Development . . . ." This provision is authorized by N.C. Gen. Stat. § 160A-317(a). Again, assuming Petitioner obtained an interpretation which would not allow the on-site septic system, he failed to pursue his remedies under the Zoning Code, but filed a direct action in federal court. Again, there was no final local decision.

Contrary to the assertion on page 3 of Petitioner's Statement of the Case, the complaint did not include an allegation of a violation of procedural due process. Only in response to the Aberdeen Defendants' Brief in Support of

their Motion to Dismiss did Petitioner seek to assert there had been a procedural due process violation. The alleged lack of notice regarding appeal rights (see Petition, p. 6-7), which is the basis for Petitioner's alleged procedural due process claim, was first raised by the Petitioner in a Declaration dated May 25, 1999, attached hereto as Appendix B, which was attached to Petitioner's and Investment Trust's brief in opposition to the Aberdeen Defendants' motion to dismiss. See ¶¶ 9, 10, 12 and 13 of Declaration, Appendix B.

ARGUMENT

As demonstrated below, there is no compelling reason for this Court to grant a writ of certiorari in this case. Both the district court decision and the Fourth Circuit Court of Appeals decision at issue are unpublished. Moreover, the district court decision affirmed by the court of appeals neither conflicts with a decision by this Court, nor with a decision of another United States court of appeals. The cases Petitioner relies on to assert otherwise are readily distinguishable based on different facts.

I. There is no Compelling Reason to Grant the Petition Because the Unpublished Decision at Issue is Not Binding Precedent in the Fourth Circuit.

The decision Petitioner is requesting this Court to review is a four sentence, unpublished per curiam opinion of the Fourth Circuit Court of Appeals (the "Opinion") which affirms an unpublished district court decision. See Appendix A and C of Petition.

Petitioner's assertion that this Court should review the Opinion because it conflicts with the recent decision of Palazzolo v. Rhode Island, __ U.S. __, 121 S. Ct. 2448 (2001) is without merit simply based on the fact that the Opinion is unpublished. An unpublished Fourth Circuit opinion is not binding precedent in the Fourth Circuit. See Hogan v.

Carter, 85 F.3d 1113, 1118 (4th Cir. 1996), cert. denied, 519 U.S. 974, 117 S. Ct. 408 (1996). In fact, the Opinion, which is designated as an "unpublished per curiam opinion", expressly states that "[u]npublished opinions are not binding precedent in this circuit." Thus, from a precedent standpoint, there is no opinion to conflict with Palazzolo. Accordingly, there is no compelling reason for this Court to grant the Petition because the Opinion is of significance only to the parties involved.

Next, to the extent the Petitioner also contends that his petition should be granted because the Opinion conflicts with a decision of another United States court of appeals, this argument too fails at the outset (without consideration of whether a conflict exists) for the same reason noted above. Because the Opinion does not constitute binding precedent in the Fourth Circuit, any alleged conflict with another circuit would not be sufficient to provide a compelling reason for this Court to exercise its discretion to review the Opinion.

II. The Palazzolo Decision Does Not Demonstrate that the Opinion at Issue is Erroneous.

Assuming *arguendo* that the Opinion has value as precedent, the Petitioner's assertion that the Opinion is in conflict with this Court's subsequent decision in Palazzolo v. Rhode Island, supra, is erroneous. The fact that Palazzolo held that a particular decision by the Rhode Island Coastal Resources Management Council ("Council") was final, and that a takings claim based on the Council's final decision could be asserted, in no way demonstrates that Palazzolo is in conflict with an opinion affirming a decision that the Petitioner's claims are not ripe. In both cases, the courts embraced and applied the principles set forth in Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108 (1985) for

determining whether a challenge to the application of land-use regulations is ripe. The outcomes were different because key underlying facts were very different.

The issue in Palazzolo was whether the Petitioner had obtained a final decision from the Council with regard to the extent of permissible development on the property in question, most of which is tidal salt marsh. The facts in Palazzolo clearly demonstrated that the decisions by the Council regarding the extent of permissible development in the wetland areas, including a decision affirmed on appeal that the one exception which would permit wetlands development under the Council's rules did not apply in this circumstance, left "no genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands." Id. at ___, 121 S. Ct. at 2460-61. There was "no doubt" that none of the wetlands on the property could be filled (i.e. no development was permissible in wetland areas), and the record also established that the upland portion of the property would have an estimated value of $200,000 if developed. Id. at ___, 121 S. Ct. at 2459-60. Thus, the Petitioner's takings claim in Palazzolo had ripened because the extent of permissible development on Petitioner's property was very clear.

In contrast, and similar to the facts in Williamson, the full extent of the use the Petitioner Tilley could make of the land had yet to be determined. As noted above, at best, the Petitioner had obtained an initial decision from an administrative official and had not pursued the available steps set forth in the Zoning Code for obtaining a final decision. Notably, the Palazzolo decsion points out that Williamson County and other cases addressing the application of land use regulations:

> [S]tand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, *including the opportunity to grant any variances or waivers allowed by law.*

Palazzolo at ___, 121 S. Ct. at 2459 (emphasis added). Because the Petitioner failed to pursue a variance or otherwise follow available avenues to allow the Town of Aberdeen to exercise its full discretion in this matter, his takings claim was not ripe. See Williamson, 473 U.S. at 191, 105 S. Ct. at 3118-19.

A second reason there is no jurisdiction in federal Court for this matter is that the Petitioner failed to exhaust his available state remedies as to the takings claim. The Court in Williamson, supra, also held the that the plaintiff's taking claim was not yet ripe because plaintiff had not sought compensation through the procedures Tennessee provided for doing so. The Court explained, "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking." Id. at 194, 105 S. Ct. at 3121. Because the plaintiff had not shown that the Tennessee inverse condemnation procedure was

unavailable or inadequate to remedy any injuries suffered by plaintiff, plaintiff's taking claim was not ripe. Id. at 196-197, 105 S. Ct. at 3122.

There is likewise an inverse condemnation statute in North Carolina, which Petitioner failed to pursue. See N.C. Gen. Stat. § 40A-51; Williamson, supra. Until Petitioner has pursued these remedies, his zoning claims are not ripe for review and were properly dismissed for lack of jurisdiction.

There is no conflict between the case at bar and Palazzolo. Both cases properly apply the law set forth in Williamson to different sets of facts. Accordingly, the Palazzolo decision does not provide this Court with a compelling reason to grant the Petition.

III. Petitioner's Due Process, Equal Protection, and Conspiracy Claims Also Are Not Ripe.

Petitioner erroneously asserts that the Fourth Circuit's decision to affirm the dismissal of Petitioner's claims ancillary to his takings claim is in conflict with other circuits. As demonstrated below, cases involving taking claims arising out of land-use regulation decisions in which such claims are held to be unripe, also consistently hold that other ancillary claims are not ripe.

For example, the Williamson Court also addressed the ripeness of the plaintiff's due process claim, which was based on an argument that the regulation of property was an invalid exercise of the state's police power, rather than a taking. The Court held that the effect of the commission's action could not be determined until a final decision was made as to how the regulations would be applied to plaintiff's property. Because that decision had not yet been reached, plaintiff's due process claim was not ripe as well. Id. at 199-200, 105 S. Ct. at 3123.

Courts have also held that the "finality" requirement applied in Williamson to takings and due process claims also applies with the same force to equal protection claims. See e.g., Taylor Investment, Ltd. v. Upper Darby Township,

983 F.2d 1285 (3d Cir. 1993), cert. denied, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993); Bigelow v. Michigan Dept. of Natural Resources, 970 F.2d 154 (6th Cir. 1992); Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 382, 116 L. Ed. 2d 333 (1991). See also Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996) (holding that "final decision" requirement applies to due process and equal protection claims "that rest upon the same facts as a concomitant takings claim").

Petitioner's reliance on John Corp. v. City of Houston, 214 F.3d 573 (5th Cir. 2000) to argue that certain of his claims are ripe is misplaced. John Corp. is readily distinguishable from Williamson, and the case at bar, because a final decision had been reached in John Corp. The takings claim in John Corp. did not arise from an interpretation of a zoning or other land-use ordinance or regulation where a final decision regarding the extent of permissible use had not yet been reached; it stemmed from a city's actual demolition of the Appellants' building. The John Corp. court even acknowledged that Williamson's finality requirement applied to due process and equal protection claims where the ancillary takings claim was not final, such as in the case at bar. See Id. at 584-85.

The Petitioner also attempts to demonstrate that the Sixth Circuit has subsequently "ignored" Bigelow v. Michigan Dept. of Nat. Res., supra, in an effort to argue that certain claims, including an alleged procedural due process claim[2], are ripe. However, the cases Petitioner cites are all distinguishable from Bigelow, and they are not inconsistent with the holding in the case at bar that none of Petitioner's claims are ripe. Petitioner relies on Harris v. City of Akron, 20 F.3d 1396, 1402 (6th Cir. 1994), cert. denied, 513 U.S. 1001, 115 S. Ct. 512 (1994), but the court expressly distinguishes Bigelow as a takings case "in which the procedural due

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[2] As will be explained below, Petitioner did not allege a procedural due process claim.

process claim was 'ancillary to [the] main issue'." Petitioner also cites Triomphe Investors v. City of Northwood, 49 F.3d 198, 201, n.2 (6th Cir. 1995), cert. denied, 516 U.S. 816, 116 S. Ct. 70 (1995), but the only claim analyzed therein was a substantive due process claim.[3]

Similarly, Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 719 (10th Cir. 1988), cited by Petitioner for the proposition that procedural due process claims may be litigated despite a related taking claim being unripe, is also distinguishable from the case at bar. In Landmark, the property interest in which the plaintiff asserted a right to procedural due process was not coextensive with the asserted taking claim. See Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm. of El Paso County, 972 F.2d 309, 311 (10th Cir. 1992) (distinguishing Landmark).[4]

Finally, the Petitioner's section 1983 conspiracy claim is also subject to the Williamson ripeness requirements. See New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1088-89 (11th Cir. 1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2514 (1997). As the district court noted in its opinion in the case at bar, if Petitioner's section 1983 conspiracy claim were not also subject to the same ripeness requirements, "plaintiffs challenging land-use regulations could circumvent Williamson in almost every case simply by tacking on a conspiracy claim." Appendix C, p. C-10 of Petition.

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3 A takings claim had been dismissed by the lower court not because of lack of a final decision, but because of a failure to utilize the procedure available under state law to seek compensating for a taking. See Triomphe Investors v. City of Northwood, 835 F. Supp. 1036, 1047 (N.D. Ohio 1993).

4 Other cases cited by Petitioner, Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) and Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215 (6th Cir. 1992), did not even involve takings claims.

Accordingly, the Opinion is not in conflict with other circuits. The district court did not commit reversible error in dismissing all of the Petitioner's claims, and the decision was properly affirmed by the Fourth Circuit.

IV. The Complaint Does Not Allege a Procedural Due Process Claim.

As explained above in Section III., the district court did not err in holding that any procedural due process claim asserted by Petitioner also should be dismissed on ripeness grounds.

However, as a threshold matter, the record demonstrates that the Petitioner failed to assert a procedural due process claim in the complaint. The district court's decision stated in part that it "*assumes for present purposes,* that the Plaintiffs have alleged a procedural due process claim. It is far from clear that they have done so, however" (emphasis added). District court opinion, Petition, Appendix C, p. C-8, n.3.

There are no facts alleged whatsoever in the complaint that relate to a procedural due process violation. The complaint raises what only can be properly described as alleged *substantive* due process violations. For example, the Plaintiffs assert harm based on Aberdeen's "refus[al] to grant permits to park mobile homes." Appendix A, Complaint, ¶¶ XX - XXVI. Plaintiffs also allege harm based on a subsequent alleged notification by Defendant Biggs that "the twenty-five vacant lots would not be able to park trailers...." Id. at ¶ XXVII. It is these "acts and things above complained of" which Plaintiffs' allege constituted a violation of their Constitutional rights. Id. at ¶ XXXI. In summarizing such alleged violations the Plaintiffs state that the Defendants "determined to deprive Plaintiff of these rights in its property *by refusing to permit* mobile homes to be moved onto lots that were vacated based on feigned noncompliance with the Town of Aberdeen ordinances"

(emphasis added). Id.. Accordingly, Plaintiffs' sole focus in regard to any due process violations alleged in the complaint is on substantive due process, in that Plaintiffs' are attacking the actual alleged decision(s) by the Town, not an alleged failure to notify with regard to a right to challenge such decision(s). The issue of lack of notice of a right to appeal the decisions complained of is without support in the complaint, and did not arise until Petitioner filed the "Declaration of Thomas E. Tilley in Support of his Opposition to the Aberdeen Defendants' Motion to Dismiss." See Appendix B, ¶¶ 9, 10, 12 and 13.

Even if the Plaintiffs' general statement in the complaint that they were "deprived of property without due process of law" (Appendix A, Complaint, ¶ XXXIII) could be construed as including a procedural due process claim,[5] as noted above, the complaint fails to allege the facts necessary to sustain such a claim. Therefore, such claim would have to be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because when construing the allegations in a light most favorable to the Plaintiffs and assuming the facts as alleged in the complaint are true (of which there are none relevant to a procedural due process claim), no relief could be granted as a matter of law. See Conley v. Gibson, 355 U.S 41, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957).

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5 A claim of denial of one's property without due process of law, such as that pled by Petitoner, has been interpreted as a *substantive* due process claim. See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 287-88 (4th Cir. 1998).

CONCLUSION

For the foregoing reasons, the Aberdeen Defendants respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted this the 24th day of September, 2001.

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Declaration of Thomas E. Tilley
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

THOMAS E. TILLEY;
INVESTMENT TRUST,
Plaintiff,

Case No.
1:98CV00896

vs.

TOWN OF ABERDEEN;
J ARTHUR PARKER, in his capacity as Mayor for the Town of Aberdeen, and individually; TONY ROBERTSON, in his capacity as Town Manager for the Town of Aberdeen, and individually; GILES HOPKINS, in his capacity as Planning Director for the Town of Aberdeen, and individually; DON WALKER, in his capacity as Code Enforcement Officer, and individually; THE BROUGH LAW FIRM, in its capacity as attorneys for the Town of Aberdeen; WILLIAM C. MORGAN, Jr., in his capacity as attorney for the Town of Aberdeen, and individually;
THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS, former Town Manager of Aberdeen; BILL MARTS, former Mayor of the Town of Aberdeen; and
SAMUEL W. FIELDS, in his capacity as an agent of the N.C. Dept of Human Resources, and individually.

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

Entered October 9, 1998

COMES NOW the afore-named Plaintiffs and for cause of action against the Defendants state as follows:

I.

Plaintiff Thomas E. Tilley is a natural individual residing in the state of North Carolina. At all times pertinent to this action Plaintiff has a title interest in Carolina Mobile Home Park in the Town of Aberdeen, County of Moore, State of North Carolina.

II.

Defendant Town of Aberdeen is now, and at all times material hereto was, a municipal corporation and governmental subdivision of the States of North Carolina.

III.

Defendant J. Arthur Parker is now, and at all times material hereto was, the Mayor for the Town of Aberdeen.

IV.

Defendant Tony Robertson is now, and at all times material hereto was, the Town Manager for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

V.

Defendant Giles Hopkins is now, and alt all times material hereto was, the Planning Director for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

VI.

Defendant Don Walker is now, and alt all times material hereto was, the Code Enforcement Officer for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

VII.

Defendant The Brough Law Firm is now the attorneys for the Town of Aberdeen. The mailing address of the defendant is in the City of Chapel Hill.

VIII.

Defendant William C. Morgan, Jr. is now, an attorney with Defendant The Brough Law Firm, is an attorney for the Town of Aberdeen. On information and belief defendant is a resident of the Middle District of North Carolina.

IX.

Defendant The North Carolina Department of Health Services, Division of Health Services, is now, and alt all times material hereto was, an executive agency of the States of North Carolina.

X.

Defendant Samuel W. Fields is now, and alt all times material hereto was, and agent of Defendant, The North Carolina Department of Health Services, Division of Health Services.

XI.

Defendant County of Moore is a subdivision of the state of North Carolina.

XII.

Defendant Steve Biggs was an agent of the Town of Aberdeen. On information and belief, defendant is a resident of Clayton, North Carolina.

XIII.

Defendant Bill Marts was an agent of the Town of Aberdeen. On information and belief, defendant is a resident of Pine Bluff, North Carolina.

XIV.

This action arises under the United States Constitution, particularly under the provisions of the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly Title 42 of the United States Code, Sections 1983 and 1985; and under Title 42 of the United States Code, Section 1988, plaintiff is entitled to attorneys' fees to vindicate the deprivations and violations of his constitutional rights by Defendants.

XV.

This court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Section 1331, which provides jurisdiction of matters arising under the Constitution and laws of the United States; Title 28 of the United States Code, Section 1343; and Title 28 of the United States Code, Sections 2201 and 2202, which authorize any court of the United States to declared the rights and other legal relations of any interested party seeking such declaration, and to grant further necessary or proper relief based on a declaratory judgment or decree.

XVI.

All acts alleged herein transpired within the State of North Carolina, therefore, venue is properly herein pursuant to 28 U.S.C. Section 1391(b), because the claims arose within the middle judicial district of North Carolina.

XVII.

Each and all of the acts of Defendants were done by Defendants, and each of them, as individuals and under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of North Carolina, the Town of Aberdeen, and the County of Moore, and under the authority of their respective offices for such city and state.

XVIII.

Prior to 1986, Plaintiff owned and operated the Carolina Mobile Home Park at its present location. Plaintiff had approval to park fifty-one (51) mobile homes connected to in place septic tanks and drain fields.

XIX.

In 1986, the Defendant, Town of Aberdeen, annexed Plaintiff's property. Defendant, Town of Aberdeen, had a pre-existing ordinance stating "all developed properties in areas subsequently annexed to the town which are served by on-site septic systems may continue to use those septic systems for a period not to exceed ten years from the date that the sewer is made available to those properties as long as those properties continue to be approved by the Moore County Health Department."

XX.

In 1989, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $104/month in 1989.

XXI.

In 1990, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $114/month in 1990.

XXII.

In 1991, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $124/month in 1991.

XXIII

In 1992, the Defendant, Town of Aberdeen, though its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $134/month in 1992.

XXIV

In 1993, the Defendant, Town of Aberdeen, though it agent, refused to grant permits to park mobile homes at four additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $134/month in 1993 through October, and $159/month thereafter.

XXV

In 1994, the Defendant, Town of Aberdeen, though its agent, refused to grant permits to park mobile homes at four additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $159/month in 1994.

XXVI

In 1995, the Defendant, Town of Aberdeen, though its agent refused to grant permits to park mobile homes at five additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $159/month in 1995.

XXVII

In 1996, despite continuous nonconforming use, Defendant Steve Biggs informed Plaintiff that the twenty-five vacant lots would not be permitted to park trailers because to do so would violate the "commercial highway" zoning. This was the first notice of zoning change given to plaintiffs.

XXVIII

In June 1998, Defendants Tony Robertson, Giles Hopkins and Don Walker, held a public hearing and found plaintiff in violation of the town nuisance ordinance.

XXIX

In July 1998, the Defendant, The Brough Law Firm, through Defendant, William C. Morgan, Jr., directed a letter to Plaintiff threatening legal action if Plaintiff did not contact Defendant Don Walker and comply with his demands to bring Carolina Mobile Home Park into compliance with several town ordinances.

XXX

In September 1998, the Defendant THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES, through Defendant Samuel W. Fields, issued a Sewage Violation Notice to Plaintiff requiring a mobile home lot be hooked up to the sewer.

XXXI

In doing the acts and things above complained of, the Defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive Plaintiff of rights guaranteed to it under the Constitution and laws of the United States, as hereinabove enumerated. Defendants, and each of them, after determining that Plaintiff could continue to use the present septic systems and park mobile homes on its property as a continuing nonconforming use determined to deprive Plaintiff of these rights in its property by refusing to permit mobile homes to be moved onto lots that were vacated based on feigned noncompliance with Town of Aberdeen ordinances.

XXXIII

By reason of conduct of defendants, and each of them, amounting to taking of Plaintiffs' PROPERTY, Plaintiff has totally been unable to earn sufficient incomes to keep the park in good repair. This anticipated result of the Defendant's conspiracy has resulting in continuing defamation of Plaintiff's reputation.

XXXIII

The conduct of defendants, and each of them, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

a. The right of Plaintiff not to be deprived of property without due process of law, secured by the Fifth and Fourteenth Amendment of the Constitution of the United States;

The right of Plaintiff not to be denied the right to equal protection of the laws, secured inversely by the Fifth Amendment and secured by the Fourteenth Amendment of the Constitution of the United States;

XXXIV

Plaintiff requests trial by jury be had on all issues at law and equity.

XXXV

The acts, conduct, and behavior of Defendants, and each of them, were performed knowingly, intentionally, and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in the sum in excess of $1,000,000.00.

WHEREFORE, plaintiff prays and demands judgment:

1. That this Court determine and declare the Plaintiff has a right to be permitted to park mobile homes on the vacant lots as a continuous nonconforming use;

2. That this Court determine and declare that Plaintiff has a right to use the current septic systems;

3. Awarding Plaintiff damages in excess of $300,000 in lost rents;

4. Awarding Plaintiff punitive damages in the amount in excess of $1,00,000.00.

5. Awarding plaintiff his costs herein and reasonable attorneys fees pursuant to 42 U.S.C. section 1998;

6. Granting Plaintiff such other and further relief as may be just.

Respectfully submitted this ___ day of October, 1998.

\s_____

Thomas E. Tilley
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Chapel Hill, NC 27514
(919) 489-2263

\s_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

NO. 1:98CV00896

THOMAS E. TILLEY, et al.,

Plaintiffs,

v.

TOWN OF ABERDEEN, et al.

Defendants.

DECLARATION OF THOMAS E. TILLEY IN SUPPORT OF HIS OPPOSITION TO THE ABERDEEN DEFENDANTS' MOTION TO DISMISS

Thomas E. Tilley declares that to his best knowledge and belief:

1. During 1989, the Town of Aberdeen (the "Town"), through its agent, refused to grant permits to park mobile homes on three vacated spaces at Carolina Mobile Homes Park (the "Park") unless the homes were hooked up to the town sewer system.

2. During 1990, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

3. During 1991, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

4. During 1992, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

5. During 1993, the Town, through its agent, refused to grant permits to park mobile homes on four additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

6. During 1994, the Town, through its agent, refused to grant permits to park mobile homes on four additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

7. During 1995, the town, through its agent, refused to grant permits to park mobile homes on five additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

8. The twenty-five mobile homes denied permission to be parked at the Park during 1989-1995 were replacements for mobile homes that moved out of the Park.

9. Declarant has never been given notice that the denial of a request for permit to park mobile homes at the Park could be appealed.

10. Declarant has never been given notice of how to appeal the denial of a permit to park mobile homes at the Park.

11. In 1996, defendant Steve Biggs informed Declarant that the twenty-five vacant lots would not be permitted to park trailers because to do so would violate the "commercial highway" zoning.

12. Declarant has never been given notice that the decision of defendant Biggs could be appealed.

13. Declarant has never been given notice of how to appeal Defendant Biggs' decision.

14. Prior to annexation by the Town, the Park had 51 spaces to park mobile homes,.

15. Declarant never saw, or knew of the provision of, the Aberdeen Zoning Code before obtaining it as an Exhibit to the Motion to Dismiss. Declarant based the allegation of paragraph XIX of the Complaint as to the Town's ordinance on one page of the 1975 Code that he had in my possession.

16. Declarant never saw, or knew of, the July 6, 1996 letter from Defendant Steve Biggs to Mr. Jerrell before obtaining it as an Exhibit to the Motion to Dismiss.

I declare under penalty of perjury that the foregoing is true and correct.

Executed the 25 day of May 1999.

/s/ _____
Thomas E. Tilley